Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37200
Docket No. MS-37874
04-3-03-3-262

The Third Division consisted of the regular members and in addition Referee J. E. Nash when award was rendered.

(Curtis A. Miller
PARTIES TO DISPUTE: (
(Canadian National/Grand Trunk Western Railroad, Inc.

STATEMENT OF CLAIM:

"This is to serve notice, as required by the Uniform Rules of Procedure of the National Railroad Adjustment Board effective March 12, 1999, of my intention to file an Ex Parte Submission within 75 days covering an unadjusted dispute between me and the Canadian National Railroad involving the following:

In early May of 2001, I began having severe dental troubles, the dentist prescribed Codeine #3's and an antibiotic. I reported to work on May 29, 2001, and advised my supervisor that I was taking a prescription narcotic and was sent home. The medication made me ill and I could not see my doctor until June 14, 2001 which was the day I was to return to work, but my illness was to(sic) severe and I telephoned the railroad to inform them that I would not be able to work on the 14th of June, and since no person answered, I left a message informing them of those facts and went to see my doctor. My doctor said that I was having an adverse reaction to the medication and advised me to discontinue them and prescribed me to rest form(sic) June 14th through the 19th and gave me a medical excuse covering these days. I reported for work on June 19, 2001, attended the morning briefing and was assigned a job, 5 hours into my work day, Supervisor John Mada approached me and said, "Mr. Miller, due to your overextension of bump days you are being taken out of service pending an investigation and would you please leave the property immediately". Supervisor John Mada escorted me to the parking lot ignoring my explanation. I telephoned Robert Papa

from the shanty and left a message stating that I understood that I overextended my bump days and requested that he call me at his earliest convenience to discuss my situation. To my surprise on June 20th, 2001, I received a certified letter from the railroad stating that my employment with the railroad had been terminated due to my overextension of bump days. I was fired without the investigation that my supervisor said was pending or any fact finding hearing what so ever. The union filed a claim with the railroad agreeing that I was well within the rules and regulation because I had provided a valid medical document excusing my absence from June 14th through the 19th 2001; the union requested that I be returned to service immediately with full seniority and restitution of lost wages. The union submitted my claim twice and each time it was denied, after the second denial, the union then informed me that there was nothing more they could do for me regarding this claim, however, the union agrees that I am well within my rights and should be reinstated immediately.(sic) After reporting for work on the 19th of June 2001, I received a certified letter on the 20th of June 2001 informing me that I'd been terminated. If the railroad and Robert Papa knew since June 14th 2001 that I had overextended my bump days, why did they not inform me by certified letter as they did with my termination, then allowed me to work for 5 hours on June 19th 2001 then terminate me for an overextension when I not only provided a valid medical excuse, but also provided a valid history of dental problems prior to the dates in question, then not send me any notice of <u>any</u> arbitration and/or investigative proceeding being held on my behalf. I was notified of nothing until all decision was made and I never had the opportunity until now to express my side of this fiasco. To remedy this injustice, I'm requesting a full investigation and fact finding hearing regarding this situation where I'm allowed to be present to provide testimony, evidence and witnesses for my behalf if a hearing and investigation is warranted, reinstatement of all medical, dental, 401k, and retirement benefits in addition to restitution of all wages lost from the date of my termination until this matter is resolved. I too request compensation for mental anguish and the immense amount of stress this wrongful dismissal has burdened me and my family with for the past year due to this miscarriage of power."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was at all material times herein an employee of the Grand Trunk Western Railroad, Inc. in the position of Maintenance of Way Trackman in the Carrier's Engineering Department. On June 6, 2001, Trackman G. Colson displaced the Claimant from his position as Trackman on Mini Tie Gang No. 1. Pursuant to Rule 4 – Seniority, Section 2 (b) of the GTW/BMWE Agreement, the Claimant was required to exercise his seniority within seven days after the date he was displaced. The cited Agreement provision reads, in relevant part, as follows:

> "b) An employee entitled to exercise seniority must exercise seniority within seven (7) days after the date affected. If he presents evidence to his supervisor that extenuating circumstances beyond his control prevented the exercise of seniority, the seven (7) days specified above shall be extended proportionately to the extent of his absence on account of such circumstances. Failure to do so will result in forfeiture of seniority under this agreement and severance of all employment rights with the company.
>
> Vacation time taken will extend displacement time to the extent of his vacation. An employee who is unable to exercise seniority and who elects not to exercise other seniority shall be furloughed."

The Claimant requested and was granted a single vacation day on June 7, 2001. Due to his one vacation day, his displacement time was extended one day until Thursday, June 14, 2001. According to the practice on the property, an employee must physically report to the work location, displace a junior employee, and work the position to which he displaced.

Meanwhile, on June 12, 2001, the Claimant called Payroll Coordinator T. Obuck to advise him that he intended to displace C. Ladd on the Material Unloading Gang, but would not report until June 13, 2001. The Claimant failed to report for work on June 13, 2001. On June 15, 2001, he telephoned to advise that he was displacing J. Macko from Rail Unit No. 1.

It is undisputed in the record that the Claimant did not exercise his seniority until 7:30 A.M. on Monday, June 18, 2001, at which time he reported to Rail Unit No. 1 at Potterville, Michigan, to displace J. Macko. When BMWE Foreman J. Hall called in to report the daily payroll information for the Rail Unit personnel, BMWE Assistant Foreman-Payroll A. Tovar told Foreman Hall to immediately release the Claimant because he had forfeited all seniority and employment rights when he failed to report for work on June 14, 2001. At approximately 1:00 P.M. on June 18, 2001, the Claimant was so advised by Foreman Hall and instructed to leave the property.

At 3:40 P.M. on the following day, June 19, 2001, the Claimant telephoned the office of Production Engineer R. O. Papa and left a recorded telephone message explaining his failure to timely displace. During the message he stated:

> "Papa, this is, ah, Curtis Miller. Ah, I would, I would, like to talk to you at your earliest convenience. Ah, could you, ah, please set up a meeting or where I could talk to you because I made a mistake. This was all my fault and, ah, I misjudged the bump days and I just wanted a little leniency. I've been with the company 6 years, I just don't want to go out like that. So if you could possibly give me a call or we could come to a conclusion or whatever, you know what I'm saying, I don't want to lose my job, I messed up and I just wanted to talk to you about it and maybe I could probably, you know, talk to you about getting reinstated. I'll talk to you a little later."

The Claimant was notified via certified mail letter dated and received on June 19 and 20, 2001, respectively, that his failure to exercise his seniority in accordance with Rule 4, Section 2(b) of the Agreement had resulted in the forfeiture of his seniority and employment rights with the Carrier.

On June 29, 2001, BMWE General Chairman P. K. Geller, Sr. submitted a claim on behalf of the Claimant seeking his reinstatement and alleging that an extenuating circumstance had prevented the Claimant from making a displacement on or before the June 14, 2001 deadline. A copy of an undated medical form alleged to be from the Claimant's doctor (Michael Popoff, D.O.) stating that the Claimant was unable to work commencing June 14 through June 19, 2001 was attached to the Organization's claim letter.

Superintendent Engineering R. A. Cerri declined the Organization's claim on August 22, 2001 on the basis the Claimant's recorded telephone message to then Assistant Superintendent Engineering Papa made no mention whatsoever of having been ill or that he was totally incapacitated and could not work. Instead, the Claimant emphatically stated that he "made a mistake," "misjudged the bump days" and asked Papa for a little leniency. Cerri further noted that he found it hard to believe that the Claimant would not have mentioned that he was totally incapacitated and could not work and, therefore, determined that such belated action on the Claimant's part was nothing more than "a prevarication by necessity." The tape cassette recording of the Claimant's telephone message was forwarded to General Chairman Geller for his information.

In letters dated August 27 and 29, 2001 General Chairman Geller appealed Superintendent Cerri's decision to Senior Manager Labor Relations M. J. Kovacs. He contended that Supervisor L. Bancroft and CN Manager Medical Services P. R. Brandon could verify that the Claimant had been under a doctor's care prior to June 14, 2001, because the Claimant was allegedly sent home one day after informing them of same, shortly before this incident. He reaffirmed the Organization's position that the Claimant was unable to make his displacement prior to June 14, 2001 due to a reaction to the medication he was taking. In the eyes of the Organization, the Claimant was being prejudged and wrongfully withheld from service.

For the first time in the history of the dispute, the Organization requested not only the Claimant's reinstatement with seniority unimpaired, but also that he be

made whole for all wages and benefits lost commencing June 19, 2001. Appended to the General Chairman's August 29, 2001 letter was a statement from the Eastland Dental Center detailing its charges for dental services provided the Claimant during the month of May 2001.

Under date of October 29, 2001 Director Labor Relations Kovacs denied the appeal on the basis the record was devoid of any evidence of extenuating circumstances beyond the Claimant's control that prevented him from exercising his seniority within the seven day time frame. She noted that rather than mentioning his alleged illness to anyone on the railroad, the Claimant explicitly stated that his failure to exercise his seniority was all his fault and a direct result of him having misjudged the bump days. She further noted that no evidence had been presented to substantiate the allegation that the Claimant was taking medication or had a reaction to such medication that prevented him from exercising his seniority during the seven day period ending on June 14, 2001. She also furnished statements from Messrs. Bancroft and Brandon that refuted the Claimant's contentions, with the exception of some recollection on the part of Supervisor Bancroft that he had instructed the Claimant in May that he could not work if he was taking medication due to "some dental problems" that would interfere with his alertness.

By letter dated October 29, 2001, General Chairman Geller reaffirmed the Organization's position that ". . . the carrier abused its discretion and acted in an arbitrary manner when Mr. Miller's seniority was forfeited and his employment was severed due to a late displacement attempt." Under date of November 19, 2001 General Chairman Geller furnished Director Labor Relations Kovacs ". . . a copy of the prescriptions Mr. Miller had prior to his late displacement in June 2001 . . ." as well as ". . . a copy of a note from his doctor showing he was under the doctor's care commencing June 14, 2001."

In her December 10, 2001 response, Director Labor Relations Kovacs reaffirmed the Carrier's position that ". . . at no time prior to June 29, 2001 did Mr. Miller or [the] Organization ever contend or even mention that illness allegedly prevented him from exercising seniority on June 14, 2001." She noted that the Claimant's work record during the first week of June clearly refuted the contention that he was ill and under the care of a doctor in early June 2001. She further noted that the medical slip provided by the Organization was the same document previously supplied to Superintendent Cerri. Moreover, the medical slip showed the diagnosis as "Cephalalgia" (headache), "Malaise," and "Fatigue" and made no

reference whatsoever to the alleged negative reaction to medication as contended in the Organization's August 27, 2001 letter.

She further noted that based upon a review of all facts in this case, the Carrier had concluded that the belated mention of "illness" and a medical slip that was not consistent with the Claimant's work record were both highly questionable and lacked credibility. The Carrier's conclusions were bolstered by the production of another medical slip issued by the Vanguard Family Health Care Center to company employee G. Wilson on November 13, 2001. According to the Carrier:

> "Mr. Wilson was sent to the Vanguard Health Center to obtain a medical slip to provide to his employer who had questioned the legitimacy of his alleged, non-existing prior illness. For a fee and without difficulty, Mr. Wilson obtained an after-the-fact medical slip to provide to his employer. This medical slip provided to Mr. Wilson was written by the same doctor who wrote the medical slip for Mr. Miller. Mr. Wilson had never been to the Vanguard Health Care Center until November 13, 2001; yet the medical slip concerning Mr. Wilson falsely states that he had been under professional care of the Vanguard center since November 8, 2001, was unable to work November 8 and 9, 2001 and may return to work on November 10, 2001. Mr. Wilson was not ill but he requested that the medical slip state that he had a stomach ache and was not able to work on November 8 and 9, 2001 and it does."

With respect to the Claimant's two prescriptions, the Director Labor Relations noted that both were written by Dr. A. L. Tiberio of the Professional Dental Center. The Claimant filled those prescriptions at a CVS pharmacy on May 2, 2001. The Erythrocin medication is an antibiotic; the prescription indicates that it was a seven-day supply and it was non-refillable. The Acetaminophen/COD #3 prescription is medication for moderate to severe pain; the prescription indicates that it was a five-day supply and it also was non-refillable. The Claimant would have consumed both prescriptions by May 10, 2001 and, therefore, they would have neither significance nor application to the time period from June 14 through June 19, 2001 which was approximately five weeks later.

Rule 4, Section 2(b) stipulates that an employee will automatically forfeit his seniority and sever all employment rights if he fails to place himself within the

seven-day displacement period unless the employee can prove that failure to do so was due to illness or some other situation beyond his control. The Carrier steadfastly maintained that it was justified in severing the Claimant's employment relationship because the Claimant was not ill. It underscored the fact that during a recorded statement the Claimant admitted that he "messed up," "misjudged the bump days and made a mistake." The Carrier reaffirmed its position that the Claimant never presented evidence substantiating that he was under a doctor's care or taking prescribed medication that would have prevented him from exercising his seniority on or before June 14, 2001.

The Carrier ultimately acknowledged that the Claimant, through the Organization, belatedly produced a second copy of a statement from Michael Popoff, D.O. (this one containing a June 14, 2001 date stamp) a June 3, 2001 statement of charges from the Eastland Dental Center and two prescription medication receipts. The Carrier opined, however, that the statements were self-serving and, more importantly, that the Claimant's illness would not have prevented him from displacing within the seven day time limit, as evidenced by his payroll record for the first half of June.

In the final analysis, the record established without question that the Claimant was undergoing major dental work in May 2001, and he may have been under a doctor's care during June 2001. As noted above, two Carrier officers were aware of the Claimant's predicament, at least to some degree. Such is evident due to the fact that on one occasion, the Claimant was admittedly instructed by a Carrier officer that he could not work if he was taking prescription medication that contained a narcotic.

Based on the peculiar facts and circumstances of this unique and tortured record, a fair resolution lies in the middle ground between the two polar positions.

First, it was manifestly clear that the Carrier had no confidence in the Claimant's physician or the validity of his terse medical opinion. For that reason, the Carrier discredited the Claimant's doctor statement. The Board is only marginally satisfied that the Claimant's doctor's statement, coupled with prior knowledge by Carrier supervisors of the Claimant's medical state, and the belatedly presented dental bill and prescriptions were cumulatively sufficient to establish conditions under which the Claimant might be protected by the provisions of Rule 4.

Secondly, although the Claimant's seniority was marginally protected, we can discern from reading the record that he played loose and reckless with his job. He should have done much more to protect the security of his employment, and having failed to do so, his injuries were, at least in part, self-inflicted. As the Claimant acknowledged when he requested leniency, he now must share the consequences of his admitted failures.

After the Claimant failed to report to work on June 14, 2001, in addition to leaving a telephone message, he should have – after leaving his doctor's appointment – stopped by his supervisor's office with a doctor's statement along with the prescriptions for medication. He should have anticipated the need for supportive medical documentation after having missed the final date for making his bump. Because he was not hospitalized and was not too sick to drive himself to his doctor's appointment and, thereafter drive himself home, he could easily have taken the time to contact his supervisor in person in order to cover such an important base. Furthermore, the June 3, 2001 statement of charges incurred at the Eastland Dental Center was not presented to the Carrier in a timely fashion.

The Board, after full consideration of the voluminous record outlined above, hereby finds that the Claimant's seniority is to be reinstated contingent upon his passing the Carrier's return-to-work physical examination, including drug and alcohol tests. This Award does not include back wages. Nor does it include reimbursement for any benefits or other compensation of any nature whatsoever, as belatedly claimed.

The Claimant is cautioned that it is highly unlikely that the Board will look upon future similar transgressions, if any, in a light favorable to him.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of September 2004.